TIONG HOCK KIENG

v.

HIAP HONG SAWMILL BHD.

HIGH COURT BORNEO, SIBU
CHONG SIEW FAI J
[SUIT NO. 54 OF 1989]
3 AUGUST 1990

CIVIL PROCEDURE: *Consent judgment entered in 1988 - Application to set aside - Grounds of mistake of law and fact and lack of knowledge - Inherent jurisdiction - No evidence to support allegations - Issue estoppel - Action struck off as applicant not present - Application to set aside this order - No appeal against this order - Variation of consent judgment.*

The plaintiff T seeks to set aside an earlier consent judgment entered against him in 1988. By a summons-in-chambers dated 25 January 1990 the defendant A applied to strike out T's action under O. 18 r. 19 Rules of the High Court 1980 (RHC) and or under the inherent jurisdiction of the Court. On 23 February 1990 as T did not appear at the hearing of the application, the Senior Assistant Registrar (SAR) struck out T's action, holding that T had no reasonable course of action. Tiong did not appeal against the decision. Three days later, T applied to set aside the order of 23 February 1990. That application was dismissed by the SAR on 9 March 1990.

This is an appeal against the SAR's order of 9 March 1990. T had sought to set aside the consent judgment of 1973 on the basis that the judgment was entered under a mistake of fact and law and without his knowledge.

Held:

[1] In an application invoking the inherent jurisdiction of the Court, all the facts may be gone into, in addition for the purpose of ascertaining what were the issues between the parties in the old action, the Court may look at whatever makes up the record in the action including the pleadings and the judgment.

[2] Having regard to the events and circumstances of the earlier actions, T ought not to be permitted now to raise the same issues to set aside the consent judgment obtained in 1988.

[3] After a consent award judgment has been passed and entered, it cannot afterwards be varied on grounds of mistake, except for reasons sufficient to set aside an agreement. The principle also applies to an application to set aside a judgment by consent.

[4] (a) On the issue of mistake T has failed to show sufficient ground for setting aside the order of the SAR made on 23 February 1990 nor has he disclosed any evidence capable of showing *prima facie*; some fundamental basis or nature of the alleged mistake upon which the action could rest.

(b) On the issue of knowledge, the principle of issue estoppel applies.

[Appeal against SAR's order of 9 March 1990 dismissed; decision of SAR on 23 February 1990 affirmed.]

Cases referred to:

Robinson v. Dunleep Singh [1878] 11 Ch D 798
Kok Hoong v. Leong Cheong Kweng Mines Ltd. [1964] 30 MLJ 49

Huddersfield Banking Co. Ltd. v. Henry Lister [1895] 2 Ch D 273
Attorney-General v. Tomlina [1877 - 78] 7 Ch D 388
Wilding v. Sanderson [1897] 2 Ch D 534
Taylor v. Taylor [1976] CAT 228A
Holsworthy UDC v. Rural District Council of Holsworthy [1907] 2 Ch D 62

Other source referred to:
Halsbury's Laws of England 4th Edn., Vol. 16, paras. 1558, 562, 1530

For the appellant/plaintiff - In person
For the respondent/defendant - Ting Sing Chuan; M/s. Yong & Wong

JUDGMENT

Chong Siew Fai J:

This is an appeal against the order of the Senior Assistant Registrar of the High Court, Sibu given on 9 March 1990 refusing the application of the plaintiff Tiong Hock Kieng (Tiong) to set aside the order made against the latter on 23 February 1990 striking out the latter's action herein.

It would be useful to give a brief account of the events leading to the making of the 2 orders.

In the present action, Tiong seeks to set aside a consent judgment entered against him and another in Sibu High Court Civil Suit No. 76 of 1973 (the old action) on the grounds that the consent judgment was entered "under a mistake of fact, law and without his knowledge", particulars thereof under para. 3 of the statement of claim are as follows:

Particulars

(a) The plaintiff was at the material times and is still not a partner of the said Ting Tuon Chuon trading under the style of "Seng Kee Timber Company" at Sibu and Miri.

(b) The said cheque on which the said consent judgment was entered was made by the plaintiff not on his account but only as agent for "Seng Kee Timber Company".

(c) The said consent judgment was entered against the plaintiff without his knowledge and consent.

The particulars items (a) and (b) (*i.e.* about Tiong's being not a partner of Seng Kee Timber Company and his signing of the cheque as agent) were, in fact, pleaded in his defence in the old action. (See Exhibit 'WLN4' annexed to Wong Lay Nam's affidavit made on 23 January 1990). Purporting them to be 'particulars', the 2 items as pleaded are irrelevant in that they are not in any way material to the contentions of "mistake of fact, law". In other words, as pleaded, they do not in any way explain or support the allegation of "mistake of fact or law". As regards item (c), while, strictly, 'consent' is not pleaded in the main para. 3, the remaining item (c) is no more than mere repetition of part of the main paragraph.

Application To Strike Out Action

By a summons-in-chambers dated 25 January 1990 the defendant herein, Hiap Hong Sawmill Berhad (Hiap Hong Sawmill) applied to strike out Tiong's present action under O. 18 r. 19 and/or under the inherent jurisdiction of the Court. The application was supported by Wong Lay Nam's affidavit made on 23 January 1990. For the plaintiff Tiong, there are 2 affidavits: one made by himself dated 15 February 1990 and another, by one Ting Tuon Chuon dated 17 February 1990.

At the hearing of the application on 23 February 1990, Tiong did not appear though duly served. After hearing submission by Counsel for Hiap Hong Sawmill, the learned Senior Assistant Registrar struck out Tiong's action, holding that Tiong had no reasonable cause of action. Against that decision, Tiong did not appeal. (O. 56 r. 1(3)).

Tiong's Application To Set Aside Order

3 days later (26 February 1990) Tiong took out another application seeking to set aside the order of striking out his action made on 23 February 1990 on two grounds. The first ground was that at the material time on 23 February 1990 he was in the verandah of the Court Registry awaiting his turn but did not hear his name or case called. To this, Hiap Hong Sawmill refuted through Wong Lay Nam's affidavit dated 7 March 1990 that Tiong's name was called at the material time on 23 February 1990 and that Tiong was not at the verandah. This was not controverted. The other ground of the application was that he (Tiong) had a reasonable cause of action, repeating, in support thereof, in substance items (a), (b) and (c) of the particulars stated above and contained in the statement of claim.

This application was heard on 9 March 1990 and was dismissed by the learned Senior Assistant Registrar who, on the evidence adduced, held, and, in my opinion, justifiably, that at the relevant time on 23 February 1990 Tiong was not 'around'. The learned Senior Assistant Registrar also maintained his earlier decision of no reasonable cause of action, holding that there was nothing to support the contentions that the consent judgment was entered as a result of mistake of facts and law or without Tiong's knowledge.

Apart from the issue raised by Tiong that his name or case was not called on 23 February 1990 respecting which the learned Senior Assistant Registrar, as I have said, had and justifiably ruled against him, the facts and matters raised in both applications (i.e. Hiap Hong Sawmill's application and Tiong's application aforesaid) are substantially the same. In the circumstances, I would consider both applications despite the fact that, strictly, Tiong did not appeal against the decision of the learned Senior Assistant Registrar striking out his present action.

In an application invoking the inherent jurisdiction of the Court, all the facts may be gone into. For the purpose of ascertaining what were the issues between the parties in the old action, the Court may look at whatever goes to make up the record in the action including the pleadings and the judgment. (see *Halsbury's Laws of England* 4th Edn., Vol. 16, para. 1558; *Robinson v. Dunleep Singh* [1878] 11 Ch D 798).

Abandoning Issues - Election

In the old action Tiong, amongst other defences, also pleaded that he was not a partner of "Seng Kee Timber Company" and that he signed the cheque as agent for the said company. At the trial on 20 September 1988 in which he was present, his Counsel, on instructions of both defendants, stated in open Court that the defendants submitted to judgment in the sum claimed. Consent judgment was accordingly entered. Thus, on record, Tiong through his Counsel had clearly made his choice, elected to abandon his defences and allowed judgment to be entered by consent. Execution on the judgment was issued and bankruptcy proceedings initiated. Some 14 months later, he commenced this action pleading, *inter alia*, the same 2 grounds seeking to set aside the consent judgment. In my opinion, he ought not be allowed to do so (*i.e.* raising those 2 grounds) in the circumstances. The following excerpt in the speech of Viscount Radcliff in *Kok Hoong v. Leong Cheong Kweng Mines Ltd.* [1964] 30 MLJ 49 PC (facts are not relevant) at 55 is pertinent:

> ...a litigant may be shown to have acted positively in the face of the Court, making an election and procuring from it an order affecting others apart from himself, in such circumstances that the Court has no option but to hold him to his conduct and refuse to start again on the basis that he has abandoned.

Suit No. 7 of 1974

Evidence was led respecting Suit No. 7 of 1974 in which a bank sued Ting Tuon Chuon and Tiong as partners of Seng Kee Timber Company. Judgment by consent was entered on 14 November 1977. The evidence adduced by Tiong is that the judgment debt had settled. On my direction, Counsel for Hiap Hong Sawmill produced a copy of a deed dated 23 April 1979 in which one Tang Nguong Sit stated therein as a friend of Tiong settled the judgment debt on Tiong's behalf by installments the last of which, according to the deed, was to be paid on or before 28 February 1984.

Pausing here, it may be observed that the content of the deed clearly contradicts the evidence adduced by Tiong that the judgment debt was paid up by Ting Tuon Chuon. However, I do not hold that against Tiong. For our purpose it is immaterial who actually paid the judgment debt in Suit No. 7 of 1974. The point of significance, however, is that, despite the evidence adduced by Tiong that the instructions to enter the consent judgment in Suit No. 7 of 1974 were given by Ting Tuon Chuon alone, the fact, as admitted by Tiong, that he subsequently did not apply to set aside the judgment because of Ting Tuon Chuon's assurance that Ting would settle the debt amply shows that Tiong knew his position, in law, respecting his liability in the firm if he did not challenge the contention that he was a partner, yet on 20 September 1988 and notwithstanding his plea in the defence of denial of being a partner, he allowed judgment to be entered against himself in the old action. This is another reason that strongly argues why he ought not be allowed to reopen the issues he had abandoned.

Having regard to the events and circumstances recounted above, Tiong, in my opinion, ought not be permitted to raise those 2 points as grounds to set aside the judgment that he had, through his Counsel, consented to be entered, despite the affidavit of Ting Tuon Chuon (co-defendant in the old action) affirmed on 17 February 1990 that Tiong was not a partner of the said timber company. Tiong had abandoned the issues. Thereupon, consent judgment was entered upon which Hiap Hong Sawmill had acted.

Consent Judgment - Setting aside

A consent order or judgment may be set aside in an action commenced for the purpose on any ground that would invalidate an agreement (*Huddersfield Banking Co. Ltd v. Henry Lister* [1895] 2 Ch D 273) or on any ground that would invalidate a compromise not contained in the judgment. (See *Halsbury's Laws of England* 4th Edn., Vol. 26, para. 562).

In our instant case, the only other 2 grounds raised by Tiong were that the consent judgment was entered:

(1) under a mistake of fact, law; and

(2) without his knowledge.

I shall now deal with these 2 grounds.

Mistake

After a judgment by consent has been passed and entered, it cannot afterwards be varied on ground of mistake, except for reasons sufficient to set aside an agreement. *Attorney-General v. Tomlina* [1877 - 78] 7 Ch D 388. The principle also applies to an application to set aside a judgment by consent.

Although in para. 3 of the statement of claim in the present action, Tiong alleged that the consent judgment was entered "under a mistake of fact, law", no facts or particulars were given in support of the allegation. Moreover, the element of mistake was not at all asserted in his affidavit made on 24 February 1990. The mention of "the alleged mistake of fact and law" in para. 2(a) of Tiong's affidavit dated 15 February 1990 was merely to support his (Tiong's) contention that the doctrine of *res judicata* did not apply, and, as such, is not a specific allegation of the consent judgment having been entered on ground of mistake.

There is also no allegation whether the alleged mistake was mutual or common to both parties. There is no or no credible evidence of mutual mistake. I say "no credible evidence" for reasons I shall give later when I deal with para. 2(b) of Tiong's affidavit dated 15 February 1990. On the other hand, if the alleged mistake were said to be unilateral (*i.e.* of Tiong's alone), of which there is no allegation or evidence, there is nothing at all indicating that the mistake was known to or, in any way, encouraged by or contributed to by Hiap Hong Sawmill, its servant or agent. See e.g. *Wilding v. Sanderson* [1897] 2 Ch D 534 particularly at 550; *Taylor v. Taylor* [1976] CAT 228A where a concluded agreement between two parties resulted from the mistake of one party, not known and not contributed to by the other party was upheld.

Where, with a view to settling dispute, a compromise has been entered into without concealment or imposition on either side, and with no suppression of what is true nor suggestion of what is false, the Court will not set aside the compromise on the ground that it contains a claim not founded in law or that the parties may have misunderstood the situation or mistaken their rights. See *Holsworthy UDC v. Rural District Council of Holsworthy* [1907] 2 Ch D 62.

Thus, respecting the issue of mistake, on the materials before me, Tiong has failed to show sufficient ground for setting aside the order of the learned Senior Assistant Registrar made on 23 February 1990. Nor has he disclosed any evidence capable of showing, *prima facie*, some fundamental basis or nature of the alleged mistake upon which the action could rest.

Knowledge

There is admission by Tiong that he was in Court on the day the consent judgment in the old action was entered. (See notes of proceedings on 30 March 1990 in the old action). The notes of proceedings also show that on 20 September 1988 (date of entry of the consent judgment), the advocate then acting for Tiong addressed the Court that he had instructions from the defendants (of whom Tiong is one) to submit to judgment, and there is nothing from the advocate suggesting to the contrary.

In answer to Wong Lay Nam's affidavit made on 23 January 1990, Tiong, in para. 2(b) and (c) of his affidavit made on 15 February 1990 said:

> (b) In respect of para. 5 of the said affidavit, I will say that prior to the consent judgment was entered against me on 20 September 1988. I was given the understanding that the defendant through its Counsel offered to settle the case amicably outside Court. The case would be further adjourned to a latter date for hearing, pending the outcome of the amicable settlement. However, the agreement or settlement outside will never come through.
>
> (c) After the bankruptcy proceedings was served on 17 October 1989, I only then realized that judgment had been entered against me.

The matter in the said para. 2(c) of Tiong's affidavit was raised by him in the old action under his application for stay of execution of the consent judgment heard on 30 March 1990. It had been decided against him. The principles of issue estoppel applies. (See *Halsbury's Laws of England* 4th Edn. 16 para. 1530).

As regards the alleged understanding in para. (b), it was not stated who gave him the understanding. As such, it is inadmissible and valueless. Moreover, the assertion of "prior to the consent judgment was entered...on 20 September 1988" is vague. It is not stated how long before the 20 September 1988. On the other hand, Tiong was, as stated earlier, in Court on the day of the entry of the consent judgment (see my judgment dated 30 March 1990 in the old action) and the record shows that the then advocate for Tiong addressed the Court that he had instructions to submit to judgment. There is, until now, nothing from the then advocate retracting from that stand he maintained in Court.

On the evidence adduced in the present application, on the events (which I have recounted) that had occurred during the period between the entry of the consent judgment on 20 September 1988 and the commencement of the present action and for the reasons given above, it is clear beyond doubt that Tiong's case of mistake of fact, law and lack of knowledge is bound to fail and that the present action is frivolous and vexatious and brought to defeat the course of justice in the hope of delaying the execution of the judgment against him in the old action.

For the above reasons, the appeal against the order of the learned Senior Assistant Registrar made on 9 March 1990 is dismissed.

As stated earlier, there is, strictly, no appeal against the order of the learned Senior Assistant Registrar made on 23 February 1990 striking out the present action (Suit No. 54 of 1989). However, to avoid confusion, I would, for reasons given in this judgment, affirm his decision of 23 February 1990 and order that the plaintiff's statement of claim be struck out under O. 18 r. 19 of the Rules of the High Court 1980 and under the inherent jurisdiction of the Court on the ground that it is frivolous and vexatious and an abuse of the process of the Court, and the plaintiff's action against the defendant be dismissed.

Costs of this appeal be paid by the plaintiff to the defendant. In the absence of an agreement, such costs are to be taxed.

Also found at [1991] 1 CLJ 393